SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 868

CONNELL RICE & SUGAR CO., INC.,
Petitioner,

v.

HOUSTON BELT & TERMINAL RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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HOUSTON BELT & TERMINAL RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Connell Rice & Sugar Co., Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 9, 1969.

CITATION TO THE OPINIONS BELOW

The opinion of the District Court (R. 113) printed in Appendix "A" hereto, page 1a, is not reported. The opinion of the Court of Appeals (R. 126) printed in Appendix "A" hereto, page 7a, is reported in 411 F.2d 1220.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1969 (R. 127). The petition for rehearing was denied on August 27, 1969 (R. 128). Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254 (1), because

the Court of Appeals has decided an important question of federal law which has not been specifically settled by this Court but should be.

QUESTIONS PRESENTED

Respondent recovered judgment against Petitioner for demurrage on cars of rice, delivery and unloading of which had been delayed by a strike. Petitioner's liability for the demurrage depends primarily upon whether the cars had been delivered to it, either actually or constructively. Respondent relies upon certain tariff provisions to show that it was entitled to make constructive placement of the cars and that demurrage began to accrue from the time such alleged constructive placement was made, instead of from the time of actual delivery of the cars. Petitioner contends that, properly construed, the tariff provisions did not authorize constructive placement, but that in any event there was in effect a controlling Interstate Commerce Commission service order, embodied in a footnote to the tariff (R. 92) under which constructive placement could not be made *unless the inability to make actual delivery was attributable to Petitioner, the consignee,* which it concededly was not here. Both courts below wholly ignored this Interstate Commerce Commission service order, and it is this which forms the principal burden of Petitioner's complaint.

Petitioner additionally contends that, since the inability of Respondent to make actual delivery was due to the default of the employees of Respondent's unloading contractor, demurrage could in no event accrue.

The questions presented are:

(1) Whether Interstate Commerce Commission Service Order No. 947 permitted constructive placement of the cars involved here, where the inability to make actual delivery

was not "on account of any condition attributable to the consignee".

(2) Whether the applicable tariff provisions authorized constructive placement of the cars involved here, when the inability to make actual delivery was not due to any "condition attributable to the consignee".

(3) Whether the employees of Respondent's unloading contractor, whose failure to perform their duties prevented actual delivery of the cars here, were "those for whom the carrier was responsible" so as to prevent the accrual of demurrage prior to actual delivery.

STATUTES, ORDERS AND TARIFFS INVOLVED

The basic statutes involved are Sections 1 (10) and 1 (15) of the Interstate Commerce Act, 41 Stat. 476-77, 49 Stat. 543; 49 U.S.C. §§ 1 (10) and 1 (15).

The relevant Interstate Commerce Commission regulation is Service Order No. 947, 28 Fed. Reg. 12127 (1963); 29 Fed.Reg. 9670 (1964); 29 Fed.Reg. 18506 (1964).

The tariff provisions relied upon by the railroad and the lower courts is Rule 5, Section A, I.C.C. H-17, Freight Tariff 4-G.

The relevant portions of all of the above matters are set forth in the Appendix.

STATEMENT

This was an action by Houston Belt & Terminal Railway Company (hereafter the "Carrier") to recover demurrage charges on certain cars of rice consigned to Connell Rice & Sugar Co., Inc. (hereafter the "Consignee") at the Long Reach Docks in Houston, Texas. Jurisdiction was alleged both on the basis of the existence of diversity of citizenship

and the requisite amount in controversy (R. 32) and the nature of the claim as arising under an Act of Congress (R. 33) (28 U.S.C. 1337).

The cars arrived in Carrier's yards adjacent to the Long Reach Docks in Houston on January 12, 1965 and subsequent dates (R. 108-112). Upon arrival at the docks, their contents were to be unloaded on vessels for foreign export. The unloading of the cars at Long Reach was performed under contract between Carrier and the owner of the docks, Gulf Atlantic Warehouse Company (hereafter the "Contractor") (R. 83-85). All unloading of cars at Long Reach was performed under similar contracts (R. 72-82). On line haul movements the charge for unloading was included in the rate and paid by the railroad to the contractor. On switch movements, such as those involved here, the charge for unloading was paid by the consignee (R. 73).

On January 11, 1965, prior to the arrival in Carrier's yards of any of the cars involved here, the longshoremen of the Port of Houston went on strike (R. 65). Contractor's employees who performed the unloading operations, though not themselves members of the "deep sea" locals which went on strike, honored the picket lines of the deep sea locals and were not available during the pendency of the strike to perform services for their employer, and no such unloading services were in fact performed by the Contractor during the pendency of the strike (R. 69).

The strike ended on March 6, 1965 (R. 65). Promptly thereafter, the cars were actually delivered and in each instance were unloaded and returned to the Carrier within the period of free time, so that, if demurrage should be computed from the time of actual delivery, none accrued (R. 108-112).

Carrier demanded payment of demurrage during all of the time that unloading was prevented by the strike. Consignee declined to pay and also, (R. 67) for reasons undisclosed by the record, declined to take advantage of a relief provision in the tariff which affords a reduction in demurrage where unloading is prevented by strike interference (R. 88).

There was in effect at all pertinent times Interstate Commerce Commission Service Order No. 947 (R. 92), 28 Fed. Reg. 12127 (1963); 29 Fed. Reg. 9670 (1964); 29 Fed. Reg. 18506 (1964), reading as follows:

"(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce and obey the following rules, regulations and practices with respect to its car service:

(1) Placing of Cars:

(a) Loaded cars, which after placement will be governed by demurrage rules applicable to detention of cars awaiting unloading, shall be actually or constructively placed within 24 hours after the first 7:00 a.m., exclusive of Saturdays, Sundays, and holidays, following arrival at destination.

(b) Actual placement means placing of car on consignee's tracks, or when for public delivery, placement on carrier's tracks accompanied by proper notice.

(c) When delivery of a car, either empty or loaded, consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track *cannot be made on account of any condition attributable to the consignee*, such car will be held at destination or, if it cannot reasonably be accommodated there, at an available hold point and constructive placement notice shall be

> sent or given the consignee in writing within 24 hours, exclusive of Saturdays, Sundays, and holidays, after arrival of car at hold point." (Emphasis added)

This order was promulgated by the Interstate Commerce Commission by virtue of its authority under 49 U.S.C. §§ 1 (10) and (15).

Respondent contends and the lower courts agreed that the right to make constructive placement and the consequent accrual of demurrage were governed, not by the service order, but by a provision of the tariff, reading as follows:

> "When delivery of a car . . . cannot be made on account of the inability of consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, notice shall be sent or given the consignee in writing or, in lieu thereof, as otherwise agreed to in writing, that the car is held and that this railroad is unable to make delivery. This will be considered constructive placement." (R. 87)

Neither of the lower courts discussed or noticed in any way the provisions of Service Order No. 947, although it was a part of the record (R. 92) and expressly called to their attention in brief, oral argument and the petition for rehearing (Supp. R. 1). Wholly ignoring that order, both of them fastened upon the quoted tariff provisions and held that the inability to make actual delivery here was due to "the inability of consignee to receive" the cars and that the tariff authorized constructive placement in that situation, regardless of whether the "inability to receive" was "attributable to the consignee". Consequently, they held that constructive placement was proper under the circumstances of this case and that the demurrage claimed was payable.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erred in wholly failing to consider and to give effect to the controlling provisions of Interstate Commerce Commission Service Order No. 947.

Service Order No. 947 expressly limits constructive placement of cars consigned as these were (R. 72) "to other-than-a-public-delivery track" to situations where actual delivery "cannot be made on account of any condition attributable to the consignee". The District Court found (R. 118) that the condition preventing delivery here was not attributable to the consignee, and that finding is unquestionably correct. The Court of Appeals' complete failure to give effect to the plain terms of the service order is incomprehensible. The order was promulgated by the Commission under its statutory duty and authority to make just and reasonable directions with respect to car service [49 U.S.C. § 1 (15)] and, even if it were in any way inconsistent with or in conflict with any tariff provisions, would unquestionably prevail. *Armour & Co.* v. *Louisiana Southern Ry.*, 190 F.2d 925 (5th Cir. 1951); *Froehling Supply Co.* v. *United States*, 194 F.2d 637 (7th Cir. 1952).

The Interstate Commerce Commission is the body to which Congress, having due regard for its expertise, has committed the details of regulating car service on the nation's railroads. The utter disregard of one of its plainly applicable orders by the Court of Appeals impairs the national transportation policy. The frequency and length of longshoremen's strikes in recent years emphasizes that the question of the proper construction and applicability of the service order and tariff provisions involved here is one of exceptional importance.

The Court of Appeals erred in construing the tariff provisions most strongly in favor of the Carrier and against the Consignee.

Even if the service order were not involved here and the tariff provisions governed, the Court of Appeals (and the District Court) was clearly wrong in giving those provisions a strained and unnatural construction in favor of the Carrier and against the Consignee. *Atlantic Coast Line R.R.* v. *Atlantic Bridge Co.*, 57 F.2d 654 (5th Cir. 1932). When in the same sentence the tariff refers to "inability of consignee to receive it or . . . any *other* condition attributable to the consignee" (emphasis added) it is perfectly plain as a matter of both syntax and logic that there would have been no purpose at all in using the word "other" unless the phrase "inability of consignee to receive it" encompasses only conditions which are also attributable to the consignee.

Ordinarily, of course, where the consignee receives shipments at his own plant, as in *Pennsylvania R.R.* v. *Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920), it would be his responsibility to provide space and facilities to receive and unload the freight, and therefore his "inability . . . to receive it" would necessarily imply some failure on his part to carry out his responsibilities and would thus be a condition "attributable" to him. We submit that in proper context that is exactly what the tariff provision means.

But since, under this record, all unloading of cars at the Long Reach plant had been performed for many years by the owner of the plant under an agreement with Carrier (R. 83-85) which expressly recites that the unloading services are to be performed for the Carrier and furnished to the Carrier, it cannot be said that there was any "inability

of the consignee to receive" the cars involved here. On the contrary, there was an inability of the Carrier to deliver because the Carrier's Contractor was unable to perform its contractual duties. None of this had any connection with the Consignee and cannot form a basis for concluding either that the Consignee was unable to receive the cars or that the nondelivery was in any way attributable to the Consignee.

The Court of Appeals' statement that "admittedly" there was here an inability of the Consignee to receive (411 F.2d 1220, 1221) is wholly unsupported by the record, as Consignee pointed out in its petition for rehearing (Supp. R. 2-3).

It is no answer to say, as the Court of Appeals does, that "frequently, demurrage is assessed and liability attaches although the delay is not caused by the assessed party" (411 F.2d 1220, 1222). That is true when delivery has once been made and the unloading and return of the car is then prevented by some extraneous cause, such as a strike. *Sinclair Refining Co.* v. *Schaff*, 275 Fed. 769 (8th Cir. 1921); *Pennsylvania R.R.* v. *Moore-McCormack Lines*, 370 F.2d 430 (2nd Cir. 1966). But that rule does not apply where delivery has never been effected.

In the alternative, since the inability of the Carrier to deliver the cars was due to the actions of those for whom the Carrier is responsible, demurrage can in no event be assessed.

As noted above, the unloading of cars delivered by Carrier to the Long Reach Docks was performed under the terms of a contract between the Carrier and the owner of the docks (R. 83-84) which expressly provided that Carrier "desires that Contractor perform for it all of such services

. . . applicable to freight moving and switching service" and that "Contractor shall furnish to [Carrier] all of the applicable services . . ." It is true that on switching movements the Consignee was to pay an additional charge for unloading, but on line haul movements, which were governed by the same contract (R. 72-85), the charge for unloading was paid by the Carrier, having been included in the line haul rate. The Court of Appeals' statement that the Carrier "apparently as a convenience to the consignee . . . engaged Gulf to perform the unloading task" (411 F.2d at p. 1221) is wholly unsupported by the record. All of the unloading of shipments, both switching and line haul, at the Long Reach Docks had for many years been performed by the Contractor for all of the carriers making deliveries there, and no consignee had any connection with the arrangement except to bear the cost thereof, either as a separate fee on switching movements or as a part of the tariff rate on the line haul movements (R. 73).

Consignee contends that the employees of the Contractor, whose failure to perform their duties made it impossible to deliver cars to Long Reach, were "those for whom the carrier is responsible" under principles recognized in such cases as *Port Terminal R.R. Assn.* v. *Connell Rice & Sugar Co.*, 387 F.2d 355 (5th Cir. 1967), where the Court refused to allow demurrage to be collected when delay in delivery was the result of a strike of the carrier's own employees.

The Court of Appeals does not mention this question at all, thus impliedly affirming the District Court's holding that this principle did not apply because the Contractor was an independent contractor and there was no evidence of any control by Carrier over Contractor's employees (R. 117). The District Court declined to consider the principles discussed in *Sinkler* v. *Missouri Pacific R.R.*, 356 U.S. 326 (1958), upon the ground that that decision was limited to

the scope of the Federal Employers Liability Act concerning injuries to employees of railroads.

That, of course, was the fact situation presented in *Sinkler,* but the Court's opinion, while basing its decision expressly upon the terms of the Federal Employers Liability Act, also recognized, in both the majority and concurring opinions, the common law rule that when a carrier engages an independent contractor to perform operational activities required to carry out its franchise, it is still responsible for the acts of the independent contractor (356 U.S. at pp. 328-329, 332). Consignee here submits that the same general rule is and should be applicable and that since, if the unloading had been performed by Carrier's own employees, demurrage would obviously not be recoverable under the rationale of the *Port Terminal* case, the mere fact that Carrier has engaged an otherwise independent contractor to perform this function cannot insulate it from responsibility for the failure of Contractor's employees to do their duty.

CONCLUSION

The judgment of the Court of Appeals is wholly incompatible with both the governing Interstate Commerce Commission service order and prior law generally on the incidence of demurrage. In the interest of a rational and consistent application of the national transportation policy, the petition for certiorari should be granted and the judgment should be reversed and here rendered for Petitioner.

Respectfully submitted,

CORNELIUS O. RYAN
Attorney for Petitioner

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON BELT & TERMINAL RAILWAY COMPANY v. CONNELL RICE & SUGAR COMPANY, INCORPORATED	Civil Action No. 66-H-620

MEMORANDUM AND ORDER

This is an action to recover demurrage charges accrued for the detention of certain railroad cars consigned to defendant and held at the storage yards of the Port of Houston for the benefit of defendant-consignee during the pendency of a longshoreman's strike at the Port. The applicable tariffs, average agreements between the parties, computation of charges and most of the facts of the case have been stipulated. The parties agree and this court finds that there is full and complete jurisdiction of the subject matter and parties.

Plaintiff Houston Belt and Terminal Railway Company is a corporation organized under the laws of the State of Texas and doing business in Houston, Texas as a common carrier by railroad engaged in transportation of property in interstate commerce. Houston Belt provides switching services at the public-owned facilities of the Port of Houston.

Defendant Connell Rice & Sugar Company, Incorporated, is a New Jersey corporation engaged in the buying and selling of rice and other commodities. From time to time

Connell orders shipments of rice for delivery to the docks at the Port of Houston. These shipments are consigned to Connell for loading on vessels for foreign export.

During the times pertaining to this action Houston Belt had contracted with Atlantic Gulf Warehouse Company to provide unloading services from the railroad cars to the docks. Gulf Atlantic, however, collected the unloading charges from the consignee of the goods to be unloaded, in this case Connell.

On January 11, 1965, the longshoremen of the Port of Houston went on strike. Although they did not join in the strike, the "warehouse locals" who performed the unloading services for Gulf Atlantic honored the picket lines, thus preventing the railroad cars from being unloaded until the strike terminated on March 6, 1965.

The railroad cars in question were hauling rice from mills and elevators in the Houston area and were delivered to Houston Belt by the originating lines in January, 1965. The shipments were consigned to Connell for delivery to the docks for export. Houston Belt provided the switching services from the originating lines to the port docks.

The cars arrived at the storage yards adjacent to the docks on January 12 and 13. Because the strike was then in progress and the cars could not be unloaded, Houston Belt did not make actual placement or deliver them to the docks. The cars remained in the storage yard until the end of the strike, when they were placed at the docks and unloaded.

Houston Belt contends that the demurrage charges under the tariff and average agreements amounted to $55,320 for holding the cars until they could be unloaded. Connell does not dispute this computation under the tariff, but contends that no demurrage accrued because the railroad cars were

not "constructively placed" within the meaning of the tariff and agreements. In the alternative, Connell contends that it is entitled to a reduced rate under the strike interference provision of the tariff.

The applicable provision of the tariff states:

> "When delivery of a car . . . cannot be made on account of the inability of consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, notice shall be sent or given the consignee in writing or, in lieu thereof, as otherwise agreed to in writing, that the car is held and that this railroad is unable to make delivery. This will be considered constructive placement." I.C.C.H-17, Freight Tariff 4-G, Hinsch, Rule 5, Section A-1.

It is Connell's contention that under this provision constructive delivery is permissible only when the inability of the consignee to receive a car is because of a condition attributable to the consignee and that since the failure and refusal of the warehouse locals to perform the work of unloading the cars was in no way attributable to the consignee, constructive placement was improper, and demurrage could not begin to accrue until actual placement of these cars for delivery. Since all of the cars were released within the period of free time following actual placement, no demurrage accrued.

It is the opinion of this court that the tariff provision stated above, provides that constructive placement of a car by the railroad may be made in lieu of actual delivery when: (1) the consignee is unable to receive it for *any* reason, or (2) the consignee is unable to receive it because of some fault attributable to the consignee. Where, however, delivery cannot be made due to some fault attributable

to the carrier railroad there must be actual delivery. This construction is in line with the general rule that demurrage is not excused because the delay is occasioned by third parties outside the control of the consignee. *Port Terminal Railroad Association* v. *Connell Rice & Sugar Co., Inc.*, 387 F.2d 355 (5th Cir. 1967); *Pennsylvania Railroad Co.* v. *Moore-McCormack Lines, Inc.*, 370 F.2d 430 (2nd Cir. 1966); *Sinclair Refining Co.* v. *Schaff*, 273 F. 769 (8th Cir. 1921); *Chicago, B. & Q. R. Co.* v. *Blink*, et al., 101 F. Supp. 219 (S.D. Iowa 1951); *Reading Co.* v. *Dexter-Carpenter Coal Co., Inc.*, 96 F. Supp. 650 (S.D.N.Y. 1951).

In addition, the applicable tariff makes provision for a reduced tariff rate when the delay is due to strike interference. Under Rule 8, Section G of the Tariff, if the consignee is unable to receive the car because of strike interference he is entitled to a substantially reduced demurrage rate during the pendency of the strike. To accept Connell's contention that there can not be constructive placement unless the delay is attributable to some fault of the consignee would negate the strike interference provision unless the strike were in some manner a result of the consignee's fault. Until delivery (either actual or constructive) is made, no demurrage may be charged.

Neither does this court accept Connell's contention that Houston Belt was responsible for the actions of Gulf Atlantic Warehouse Company's employees that honored the longshoremen's picket lines and caused the delay in unloading the cars. There is no evidence of any control by Houston Belt over the warehouse locals or that they or their employees were the railroad's "agents". *Sinkler* v. *Missouri P. R. Co.*, 356 U.S. 326 (1958), cited to the court by Connell, is not in point as that decision was limited to the scope of the Federal Employers' Liability Act concerning injuries to employees of a railroad. It is the

opinion of this court that the consequences of the strike are not attributable to either the plaintiff or the defendant herein.

Finally, it must be held that Connell was not entitled to a reduced demurrage rate under the strike interference clause. It is undisputed that Connell made no claim for the reduced rate to Houston Belt in writing as is required by the tariff, even though Connell was advised that such claim should be made if they wished to take advantage of that provision. In such a situation the notice requirement is a condition precedent to obtaining the reduced rate. *Port Terminal Railroad Association* v. *Connell Rice & Sugar Co., Inc.*, 387 F.2d 355, 357 (5th Cir. 1967); *St. Louis, Southwestern Ry. Co.* v. *Mays*, 177 F.Supp. 182, 184 (E.D. Ark. 1959).

Judgment will be entered in favor of plaintiff.

Counsel will submit an appropriate final judgment within twenty (20) days.

The Clerk will file this Memorandum Opinion and provide counsel of record with true copies.

Done at Houston, Texas, on this the 30th day of August, 1968.

/s/ Woodrow Seals
United States District Judge

True Copy I Certify
Attest:
V. Bailey Thomas, Clerk

By /s/ Jacque Royce
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON BELT & TERMINAL RAILWAY COMPANY V. CONNELL RICE & SUGAR CO., INC.	CIVIL ACTION NO. 66-H-620

JUDGMENT

This cause came on for trial before the court without a jury on the 11th day of September, 1967, and the issues having been tried and the court having written a memorandum opinion and directed that plaintiff recover from the defendant, Connell Rice & Sugar Co., Inc., the sum of FIFTY-FIVE THOUSAND THREE HUNDRED TWENTY DOLLARS ($55,320.00), together with interest thereon at the rate of six per cent (6%) per annum from April 1, 1965, in the amount of ELEVEN THOUSAND FOUR HUNDRED EIGHTY-FOUR AND 72/100 DOLLARS ($11,484.72); it is

ORDERED, ADJUDGED and DECREED that plaintiff, Houston Belt & Terminal Railway Company recover from the defendant, Connell Rice & Sugar Co., Inc., the sum of SIXTY-SIX THOUSAND EIGHT HUNDRED FOUR AND 72/100 DOLLARS ($66,804.72), together with interest thereon at the rate of six per cent (6%) per annum from date of this judgment until paid and all costs.

SIGNED and ENTERED this 19th day of September, 1968.

/s/ WOODROW SEALS
United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27094

HOUSTON BELT & TERMINAL RAILROAD COMPANY,
Plaintiff-Appellee,

v.

CONNELL RICE & SUGAR CO., INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(June 9, 1969)

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

TUTTLE, Circuit Judge: Connell, a consignee of 78 railroad cars of rice, appeals from a judgment holding it liable for demurrage charges because of the delay in unloading the cars.

The problem here arose when Houston, a belt line, received the cars from other carriers and undertook to deliver them to the destination designated by Connell, but which delivery was frustrated. This destination was the dock side warehouse of Gulf Atlantic Warehouse Company. Stevedores were on strike at the time, and, although Gulf employees were not on strike, they honored the longshore-

Under the prevailing relationship between carrier, Houston, and the consignee, Connell, the task of unloading demen's picket lines and refused to unload the cars.

volved upon the consignee. However, apparently, as a convenience to the consignee, Houston engaged Gulf to perform the unloading task, for which it would then bill Connell. Payment for this task was no part of the carrier's tariff.[1]

We have previously dealt with other phases of a similar demurrage claim in *Port Terminal Railroad Association* v. *Connell Rice & Sugar Co.* (5 Cir., 1967), 387 F.2d 355. However, we did not deal with the matters now urged upon us. In that case, the court allowed the carrier to collect demurrage from Connell when delivery was made impossible because of a longshoremen's strike, which in fact caused a de facto embargo on delivery to *destination.* This resulted from a backup of unloaded cars.

The solution of the problem rests upon a construction of a provision of the applicable tariff:

> "When a delivery of a car . . . cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, notice shall be given or sent to the consignee in writing, or, in lieu thereof, as otherwise agreed to in writing, that the car is held or that this railroad is unable to make delivery. This will be constructive placement."

When there is constructive placement, the consignee is then permitted to minimize demurrage by electing to do so by notice to that effect. Here, Connell did not so elect, contending that there *was no constructive placement* be-

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[1] Because of the disposition we make of the case, we do not need to determine whether under this arrangement, the failure by Gulf's employees to perform their unloading because of the strike of third parties, was tantamount to a similar failure if that had occurred by Connell's own employees. Connell concedes that if the failure to unload was chargeable to it, then it should not prevail here.

cause its "inability" to "receive" the cars was not "because of a condition attributable to" it.

Connell contends that the only circumstance that permits the constructive placement is one which involves fault attributable to the consignee. Here, for the purpose of this discussion, we assume the failure of Gulf was not "attributable" to Connell (see footnote 1). However, we think that Connell has misread the tariff. It says explicitly that "when delivery of a car . . . cannot be made on account of the inability of consignee to receive it [admittedly the situation here]" there may be constructive placement. To be sure, it also says "or because of any other condition attributable to the consignee." We do not think the fault of consignee language can be held to modify the clear language first quoted above.

This constructive placement tariff provision was not before the court in the Port Terminal Railroad Association case, supra, but it is expressly relied upon here. As stated in that case:

> "Demurrage charges are in the nature of a penalty that is assessed against railroads and shippers alike in order to promote prompt loading and unloading of cars. Frequently, demurrage is assessed and liability attaches although the delay is not caused by the assessed party. See, e.g., Pennsylvania R.R. Co. v. Moore-McCormack Lines, Inc., 370 F.2d 430 (2nd Cir. 1966)." Port Terminal Railroad Ass'n v. Connell Rice & Sugar Co., 387 F. 2nd 355, 357.

Here, since Connell did not act upon the privilege accorded it upon receiving notice of constructive placement and give notice to minimize demurrage, it must be held liable for regular demurrage as such.

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 27094

D. C. Docket No. CA 66-H-620

HOUSTON BELT & TERMINAL RAILROAD COMPANY,
Plaintiff-Appellee,

v.

CONNELL RICE & SUGAR CO., INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that the defendant-appellant, pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 9, 1969

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 27094

HOUSTON BELT & TERMINAL RAILROAD COMPANY,
Plaintiff-Appellee,

v.

CONNELL RICE & SUGAR CO., INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(August 27, 1969)

ON PETITION FOR REHEARING

Before TUTTLE and GEWIN, Circuit Judges, and COMISKEY, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX "B"

INTERSTATE COMMERCE ACT, 41 Stat. 476-77, 49 Stat. 543; 49 U.S.C. § §1 (10) and 1 (15).

(10) The term "car service" in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

* * *

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint, or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable . . ."

INTERSTATE COMMERCE COMMISSION SERVICE ORDER NO. 947, 28 Fed.Reg. 12127 (1963); 29 Fed.Reg. 9670 (1964); 29 Fed.Reg. 18506 (1964)

SERVICE ORDER NO. 947
RAILROAD OPERATING REGULATIONS FOR FREIGHT CAR MOVEMENT

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 7th day of November, A. D. 1963.

It appearing, That an acute shortage of freight cars exists in all sections of the country; that cars loaded and empty are unduly delayed in terminals and in placement at, or removal from industries; that present rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of freight cars are insufficient to promote the most efficient utilization of cars; it is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§95.947 RAILROAD OPERATING REGULATIONS FOR FREIGHT CAR MOVEMENT.

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce and obey the following rules, regulations and practices with respect to its car service:

(1) Placing of Cars:

(a) Loaded cars, which after placement will be governed by demurrage rules applicable to

detention of cars awaiting unloading, shall be actually or constructively placed within 24 hours after the first 7:00 a.m., exclusive of Saturdays, Sundays, and holidays, following arrival at destination.

(b) Actual placement means placing of car on consignee's tracks, or when for public delivery, placement on carrier's tracks accompanied by proper notice.

(c) When delivery of a car, either empty or loaded, consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of any condition attributable to the consignee, such car will be held at destination or, if it cannot reasonably be accommodated there, at an available hold point and constructive placement notice shall be sent or given the consignee in writing within 24 hours, exclusive of Saturdays, Sundays, and holidays, after arrival of car at hold point.

RULE 5, SECTION A, I.C.C. H-17,
FREIGHT TARIFF 4-G

1. When delivery of a car consigned or ordered to an industrial interchange track or to other-than-a-public-delivery track cannot be made on account of the inability of consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, notice shall be sent or given the consignee in writing or, in lieu thereof, as otherwise agreed to in writing, that the car is held and that this railroad is unable to make delivery. This will be considered constructive placement. . . .

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No. 868

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CONNELL RICE & SUGAR CO., INC.,
Petitioner,

v.

HOUSTON BELT & TERMINAL RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Respondent (the "Carrier") recovered judgment against Petitioner (the "Consignee") for demurrage charges accruing due to the detention of Carrier's cars by Consignee because the cars loaded with Consignee's rice could not be unloaded at the Port of Houston because of strike interference at the point where the unloading was to be accomplished.

Carrier claims that its delivery of the cars involved herein to the storage yards adjacent to the unloading docks was constructive placement of the cars as that term is defined under the applicable tariff and that it properly assessed

demurrage herein because Consignee did not take advantage of reduced demurrage rates available to it under the "Interference Due to Strikes" clause of the tariff.

Consignee contends that such placement was not constructive placement because the strike interference was not on account of conditions attributable to it. However, it is undisputed that Carrier properly placed the cars in the storage yards adjacent to the unloading docks when unloading was prevented because of strike interference at the Port of Houston and that Carrier held said cars for Consignee in the storage yard during the strike.

The question presented is:

Whether the Carrier in this case was prevented from charging demurrage to the Consignee when the strike interference at the point of unloading was not attributable to either party.

STATUTES, ORDERS AND TARIFFS INVOLVED

In addition to the authorities cited by Petitioner, the following tariff provisions are applicable:

Rule 5, I.C.C. H-17, Freight Tariff 4-G,

Rule 8, Section G, I.C.C. H-17, Freight Tariff 4-G.

STATEMENT

The cars involved herein were hauling rice consigned to Consignee at the Port of Houston and were delivered to the Carrier by the originating lines (Stipulation 6, R. 65, 66). The Carrier only handled the cars in switching traffic to the docks (R. 69). Gulf Atlantic collected the unloading charges on the freight in said cars from Consignee (R. 70). Carrier made no charge to Consignee and received no compensation from Consignee for the unloading of said cars (R. 70).

When the cars arrived in Carrier's yards, the longshoremen, "deep sea locals," were on strike (R. 65). Employees of Gulf Atlantic, "warehouse locals," who were to do the

unloading, were not on strike, but honored the picket lines of the "deep sea locals" during the pendency of the strike (Stipulation 13, R. 69).

Concerning the interference due to strikes, the applicable tariff Rule 8, Section G (App. 12, Stipulation 7, R. 66) provides:

> "1. When it is impossible . . . unload . . . or receive cars from . . . this railroad *because of strike interference at the point** where the . . . unloading is to be accomplished, detention to each car due to that cause from the first 7:00 A.M. after such interference begins until the first 7:00 A.M. after such interference ceases as to each car will be excluded in computing . . . charges . . . Such detention on loaded or empty cars . . . will be charged for at the rate of $3.13 per car per day . . . provided claim in writing is presented to this railroad within 30 days . . . after the date on which strike ceases, stating the date and time interference began and ceased."

Further, Rule 5 (App. 12) of the tariff (R. 87) provides:

> "* * * Under this rule the time of movement between hold point and destination and any *other time for which the railroad is responsible will not be computed against the consignee.*

"Section A.—

> "1. When delivery of a car . . . cannot be made on account of the *inability of consignee to receive it,* or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, notice shall be sent or given to consignee in writing, or, in lieu thereof, as otherwise agreed to in writing, that the car is held and that this railroad is unable to make delivery. *This will be considered constructive placement.*"

---

* Emphasis and parenthesis supplied throughout brief.

It was stipulated (R. 65) "that a car in local switch traffic for delivery at a terminal's docks would be considered as constructively placed within the meaning of" Rule 5 "without notice from 7:00 o'clock a.m. of the first day on which the clerk's yard check locates the car in the storage yard of the terminal." It was further stipulated (R. 66) that the exhibits attached to the complaint "accurately reflect . . . the number of days each car was held from the date on which the clerk's yard check located each such car in the storage yard of the terminal."

Interstate Commere Commission Service Order No. 947, referred to by Consignee, requires that cars "shall be actually or constructively placed within 24 hours," and "constructive placement notice shall be sent or given the consignee in writing *within 24 hours*" when "delivery of a car . . . cannot be made *on account of any condition attributable to the consignee.*" The service order does not define constructive placement, nor contradict Rule 5 or the agreement between the parties as to constructive placement, but simply requires prompt placement, actual or constructive, and prompt notice to Consignee when the delay is attributable to Consignee.

The District Court held that the consequences of the strike were not attributable to either the Carrier or the Consignee (R. 118), and that to accept Consignee's contention that there cannot be constructive placement unless the delay is attributable to some fault of the Consignee would negate the "Interference Due to Strikes" (App. 12) provision unless the strike were in some manner a result of the Consignee's fault (R. 117).

The Fifth Circuit Court of Appeals held there was constructive placement under the terms of Rule 5, Section A, of the tariff, and that Consignee was liable for regular demurrage because it did not take advantage of reduced

demurrage under the "Interference Due to Strikes" tariff provision.

ARGUMENT

Both courts below held there was constructive placement of the cars in question and that demurrage was properly assessed against consignee. Since that conclusion is correct and there is no conflict of decisions nor important question of federal law, further review by this Court is not warranted.

The Carrier was entitled to make constructive placement of the cars because of the Consignee's inability to receive cars from the Carrier due to strike interference at the point of unloading not attributable to the Carrier, and the "Interference Due to Strikes" tariff controls.

The arguments made herein were also presented by this very same Consignee in *Port Terminal Railroad Ass'n.* v. *Connell Rice & Sugar Co.*, 387 F.2d 355, 357 (5th Cir., 1967), and the Fifth Circuit Court of Appeals in this case quoted with approval from that decision wherein the general rule is stated:

> " 'Demurrage charges are in the nature of a penalty that is assessed against railroads and shippers alike in *order to promote prompt loading and unloading* of cars. *Frequently, demurrage is assessed and liability attaches although the delay is not caused by the assessed party.* See, e.g., Pennsylvania R.R. Co. v. Moore-McCormack Lines, Inc., 370 F.2d 430 (2nd Cir., 1966)."

Consignee makes the statement (Br. 7) that Service Order No. 947 "*expressly limits* constructive placement of cars" to situations when actual delivery is prevented on account of some condition attributable to Consignee. Consignee's statement is totally inaccurate. The service order does not define nor limit constructive placement, nor contradict Rule 5, wherein constructive placement is defined,